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EDITORIAL COMMENTS

INTERNATIONAL LAW AND THE INTERNATIONALIZED CONTRACT

The arbitral award in the *Texaco/Calasiatic* case,¹ rendered by Professor René-Jean Dupuy, acting as sole arbitrator, nearly 3 years ago, has received surprisingly little attention in American legal publications.² Whatever the exact reason for this neglect,³ it seems undesirable to let such an important document pass unobserved. Of course, this comment can deal with only a few of the major issues involved and must leave to one side several important problems, in particular those of conflict of laws.

The arbitration concerned the nationalization by Libya of several petroleum concessions held by two American companies.⁴ The award's line of reasoning may be sketchily summed up: It is held, at the very start, that international law governs the arbitration's procedure (paras. 11-16) and that the deeds of concession involved are contracts "within the domain of international law" (paras. 19-35). The entire contractual relationship is "internationalized" (paras. 36-52). Nationalization is held to be a breach of the contracts. This holding is supported by findings that (1) the contracts are not "administrative contracts" (paras. 54-57); (2) the nationalization measures, albeit sovereign acts, cannot "nullify" contracts that are internationalized (paras. 58-79); and (3) the UN General Assembly resolutions purporting to assert exclusive national competence in matters of nationalization are not positive international law (paras. 80-91). Accordingly, the Libyan Government is required "to perform and give full effect" to the concessions it has breached, *restitutio in integrum* (as contradistinguished from damages) being, both under Libyan law and under in-

¹ *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, award dated January 19, 1977, reprinted in 17 ILM 1 (1978) [Eng. trans.]. References hereinafter will be to the "Award," followed by paragraph numbers. For the authentic French text of part III of the award, see 104 J. DROIT INT'L (Clunet) 350 (1977).

² But see now the valuable discussion in broader context by K. Venkata Raman, *Transnational Corporations, International Law, and the New International Economic Order*, 6 SYRACUSE J. INT'L L. & COM. 17 (1978). The award was also cited and followed in the *Revere* arbitration, note 10 *infra*. For commentaries in French, see J. F. Lalive, *Un grand arbitrage pétrolier entre un Gouvernement et deux sociétés privées étrangères*, 104 J. DROIT INT'L (Clunet) 319 (1977); Rigaux, *Des dieux et des héros*, 67 REV. CRITIQUE DROIT INT'L PRIVÉ 435 (1978); Cohen-Jonathan, *L'arbitrage Texaco-Calasiatic contre Gouvernement Libyen*, [1977] ANNUAIRE FRANÇAIS DE DROIT INT'L 452.

³ Surfeit with the overabundant literature on state contracts with aliens may be one reason. References here are limited to those strictly necessary.

⁴ The nationalization occurred in two phases in 1973 and 1974. Both Libyan decrees provided for eventual compensation of the companies; Award, paras. 6 and 7. Libya did not participate in the proceedings, except for a memorandum objecting to the arbitration.

international law, "the normal sanction for non-performance of contractual obligations" (paras. 92-109).

The principal thrust of the award should be apparent even from this bare-bones summary, which does less than justice to the skill and style of the master jurist who is its author. The essential points, debated at great length in the late 1950's and early 1960's,⁵ concern first, the possibility of "elevating" contracts between a state and a foreign national to international status, and second, the legal effects of such internationalization. A third issue, rarely treated directly in international practice, is that of the place of *restitutio in integrum* (or specific performance) as a remedy in international law.

Once the possibility of some kind of internationalization of contracts between a state and a foreigner is admitted,⁶ the question arises of the conditions under which it can be brought about. The instant award lists three possible manners, any one of which is said to suffice: The contract may refer to "general principles of law" as the applicable law, it may contain an arbitration clause, or it may be an "economic development agreement."⁷ It is striking that the simplest and most obvious possibility, that of explicit reference to international law, is not on the list—perhaps because it is extremely rare, if not unheard of.⁸ All three of the methods listed are founded on more or less distant inferences. Would it not be reasonable, however, to require that, for such a serious legal consequence to be brought about, an explicit statement of the intent of the parties should be needed? After all, the clauses and other indications listed are capable of being given effect in

⁵ Among recent comprehensive studies, see the valuable survey and analysis in J. Kuusi, *State Contracts with Foreigners: Considerations on Law and Policy* (unpub. thesis, Oxford 1976), and the exhaustive comparative discussion of doctrine, legislation, and case law on the related issue of arbitration between states and private persons, in A. Vergopoulos-Michail, *Problèmes relatifs à l'arbitrage en matière d'investissements privés internationaux* (unpub. thesis, Paris-II 1978). An original theoretical approach is found in F. RIGAUX, *DROIT PUBLIC ET DROIT PRIVÉ DANS LES RELATIONS INTERNATIONALES* 366 ff. (1977). For an impressionistic review of eminent opinions on the subject, see the reports and discussions in *INSTITUT DE DROIT INTERNATIONAL*, 57 *ANNUAIRE* 192-265 (1977 I), *id.* at 318-25 (1977 II).

⁶ The point is not conceded by several eminent jurists and by the great majority of Third World states. See, e.g., Wengler, *Les accords entre Etats et entreprises étrangères sont-ils des traités de droit international?*, 76 *REV. GÉN. DROIT INT'L PUB.* 313 (1972). There is a certain "bootstrapping" quality to the related argument in the award: Since, according to it, it is international law that authorizes the parties (particularly the state party to the contract, presumably) to choose freely the applicable law (para. 35), it must first be found that the contracts involved "are within the domain of international law" before proceeding to construe the relevant clause so as to declare international law the governing law. The assertion that the contracts are internationalized comes so early in the award (para. 22) that one is not certain how far each of the subsequent references to it justifies or merely qualifies (or describes) internationalization.

⁷ Award, paras. 40-45. For critical analysis of this section of the award, see Cohen-Jonathan, *supra* note 2, at 459-66; Rigaux, *supra* note 2, at 443-44, 446-49; Vergopoulos-Michail, *supra* note 5, at 98-109.

⁸ Compare J. Verhoeven, *Contrats entre Etats et ressortissants d'autres Etats*, in *LE CONTRAT ÉCONOMIQUE INTERNATIONAL: STABILITÉ ET ÉVOLUTION* 115, 141 (1975).

manners which would not trigger the contract's internationalization. As the award notes, the "general principles of law" are at best only one of the sources of international law; they are by no means coextensive with international law in its entirety.⁹ The presence of an arbitration clause can hardly be construed as necessarily a sign of internationalization—are all charter parties entered into by states internationalized? In a way, it is the third, and vaguest, of the bases for a state contract's internationalization that gives away the game: For only where a developing country is the state party to the contract could this test ever come into effect.¹⁰ Thus, existing presumptions against limiting the sovereign authority of states, a principle as fundamental in international law as it is widely accepted, are casually reversed; inferences (*i.e.*, presumptions) favoring such limitations to the benefit of private parties are now applied.

Internationalization of the contract, moreover, resolves nothing by itself. It provides no generally accepted answers to the quest for the legal rules applicable.¹¹ The only explicit rule the award appears to deduce is that the principle *pacta sunt servanda* is applicable, which does not help much. Any law of contracts, national or international, is bound to start with this principle. But it cannot just stop there. In reality, the most important consequence of internationalization is implicit. In simplest terms, once a contract has moved to the international level, it cannot lawfully be affected by unilateral, national legal action. Since states cannot invoke their

⁹ Award, para. 41. In the case at hand, the contract referred to "the principles of the law of Libya common to the principles of international law and in the absence of such common principles . . . the general principles of law, including such of those principles as may have been applied by international tribunals." Award, para. 23. The award construed this clause as in essence a reference to international law. Libyan law was considered in 4 instances, at a high level of abstraction, and in no case was it found not to coincide with international law. Construing the same clause, Judge Lagergren, in the *BP* arbitration, emphatically rejected the general applicability of international law, insisting on the role of the general principles of law. See G. WETTER, 1 *THE INTERNATIONAL ARBITRAL PROCESS* 432, 437-39 (1979), and see *infra* notes 21, 26.

¹⁰ The excessive looseness of the related argument, gently criticized in the otherwise favorable comment by Professor Cohen-Jonathan, *supra* note 2, at 466, and scathingly attacked by Rigaux, *supra* note 2, at 456-58, is confirmed by its use in the *Revere* arbitration, *Revere Copper, Inc. v. O.P.I.C.*, August 24, 1978, reprinted in 17 *ILM* 1321 (1978). The majority opinion in that award found it possible to hold that a state contract was internationalized, in the absence of either a reference to international law or to general principles of law or an arbitration clause, merely because it involved the exploitation of natural wealth and resources. This holding formed the basis for a finding that the alleged breach by the host Government of a tax stabilization clause (a clause held to be unconstitutional and therefore ineffective by the national Supreme Court concerned) constituted an "expropriation," under the terms of a guarantee contract between the company and the Overseas Private Investment Corporation. See, in this connection, the dissenting arbitrator's opinion, *id.* at 1372 ff.

¹¹ Compare Verhoeven, *supra* note 8, at 140-41. In fact, differing conceptions of the substantive rules to be applied underlie (and undermine) much of the apparent consensus among various writers on this topic. See Fatouros, *The Administrative Contract in Transnational Transactions: Reflections on the Uses of Comparison*, in *Jus PRIVATUM GENTIUM. FESTSCHRIFT FÜR MAX RHEINSTEIN* 259, 262 (1969).

sovereignty to abrogate an international treaty, it is argued, neither can they do so to alter an internationalized contract.

This last proposition is treated as self-evident in the award (paras. 66-68, 91), yet it involves an interesting transformation in the nature of the approach used. The possibility of internationalization is founded on affirmation of the diversity and multiplicity of the possible subjects and rules of international law. As the award points out, "treaties are not the only type of agreements governed by [international] law. . . . [C]ontracts between States and private persons can, under certain conditions, come within the ambit of a particular and new branch of international law: The international law of contracts" (para. 32). Once international law is thus opened up, however, its vaunted diversity somehow disappears. The rules actually applied are those of traditional international law, at its strictest; but if the "international law of contracts" is identical in content with the international law of treaties, why is it necessary to stress the distinction? If the multiplicity of subjects and kinds of international law is to have any meaning, there has to be at least a possibility of variation in legal outcomes. To fashion an appropriate body of law, based on "general principles of law" and on international practice, the relevant inquiry must be directed at the principles applicable in fact to state contracts in national law¹² and at the abundant recent experience with nationalizations and other types of interference with state contracts. The award at hand contents itself instead, in the first place, with a brief reference to the doctrinal notion of the *contrat administratif*, as elaborated in French law, concluding that such a precise notion is not found in other legal systems,¹³ and, in the second place, with an offhand dismissal of recent practice as inconclusive, on the ground that it has "been inspired basically by considerations of expediency and not of legality."¹⁴

A disregard of state practice, in favor of doctrinal pronouncements and a small number of arbitral awards, marks much of the argumentation in the award¹⁵ but is particularly noticeable in the paragraphs leading to

¹² This is not the place, of course, for an elaboration of other approaches to this by no means novel question. For earlier attempts, see Fatouros, *supra* note 11; A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 196-209, 261-301 (1962). And compare W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 200 ff. (1964); Weil, *Un nouveau champ d'influence pour le droit administratif français: le droit international des contrats*, [1970] ETUDES ET DOCUMENTS DU CONSEIL D'ETAT 13.

¹³ Award, para. 57. The sole arbitrator refers on this point to the discussion of "general principles of law" by the late Wolfgang Friedmann, citing page 196 of *The Changing Structure of International Law* (1964), while curiously failing to mention that a few pages later the same book strongly supports the application of the *contrat administratif* concept to concessions and similar state contracts (pp. 200 ff.). And see on the comparative law of public contracts, J. D. B. MITCHELL, THE CONTRACTS OF PUBLIC AUTHORITIES: A COMPARATIVE STUDY (1954); Langrod, *Administrative Contracts*, 4 AM. J. COMP. L. 325 (1955); Bolgar, *The Public Interest: A Jurisprudential and Comparative Overview of the Symposium on Fundamental Concepts of Public Law*, 12 J. PUB. L. 13, 34-51 (1963).

¹⁴ Award, para. 69. *Shades of Barcelona Traction! Compare* [1970] ICJ REP. 3, 40.

¹⁵ See, e.g., Award, paras. 65-69, where citation of 2 earlier investment arbitrations,

its holding that *restitutio in integrum* is in international law the normal remedy for breach of contract (paras. 96-109). Earlier studies have pointed out that, while the common assertion in doctrinal writings has been that *restitutio* is the "normal" remedy and damages the "exceptional" one,¹⁸ state practice, both diplomatic and judicial, "follows a pattern which is exactly the opposite of the one accepted in theory. In practice, compensation constitutes the principal remedy, *restitutio* being clearly an exceptional one."¹⁷ In the relatively few contested cases where *restitutio* has been ordered or agreed, compensation generally would have been insufficient.¹⁸

While admitting that some of the better known judicial assertions of the principal character of *restitutio* are mere *obiter dicta*, the award invokes their manner of formulation and repeated citation to argue that they constitute "a principle of reasoning having the value of precedent" (para. 98). Major reliance is placed on a string of quotations from eminent authors, asserting in varying ways the primacy of *restitutio*, and on the findings of a single recent study favoring this position.¹⁹ The award dismisses the cogent argumentation to the opposite effect of an earlier study²⁰ by labeling it "isolated" and by referring to the arguments in an unpublished legal opinion submitted by the plaintiffs (para. 102 *ad finem*). Surprisingly, there is no mention of a very recent award, in a case on all fours with the one here involved, where the sole arbitrator appears to have held that *restitutio in integrum* is not in international law the principal

a quotation from the late Charles de Visscher, and certain inferences from a PCIJ judgment and a UN General Assembly resolution are capped by the bald assertion: "Such is the present state of international positive law."

¹⁸ One should note that, in many instances, the relevant passages in doctrinal writings are subject to differing interpretations. References to the standards for the assessment of compensation (e.g., "monetary compensation must, as far as possible, resemble restitution," per Jiménez de Aréchaga, as quoted in the Award at para. 102) do not necessarily imply acceptance of the primacy of *restitutio* as a remedy.

¹⁷ A. FATOUROS, *GOVERNMENT GUARANTEES*, *supra* note 12, at 311-12. There is, moreover, no cogent reason in theory or policy to accept the traditional position; *id.* at 312-13. The award honors my book with quotation of an earlier passage, which it construes as descriptive (*id.* at 310-11, quoted in Award, para. 103); it does not address itself to the conclusions reached a page or two later.

¹⁸ See *infra* note 19.

¹⁹ The study in question is, M. Bernad Alvarez de Eulate, *La "restitutio in integrum" en la práctica y en la jurisprudencia internacionales*, 11 TEMIS, REV. CIENCIA & TÉCNICA JURÍDICA 11-40 (Zaragoza, Nos. 29-32, 1971-72). The article is a summary of the author's doctoral thesis. In a prefatory footnote, Professor Dupuy, among others, is thanked for his help. Dr. Bernad goes over a long listing of cases, the overwhelming majority of which concern classical instances where compensation would have been manifestly insufficient: release of persons, delivery of ships, and restitution of works of art, documents (and sums of money (!)), and of territory. As to these, and as to some more problematic cases (involving, e.g., declarations of validity or invalidity of national measures), it is not clear from the necessarily brief summaries how far the outcome in each case was determined by the *compromis*, by the stipulations of the parties, etc. Apparently, none of the studies directly challenging the legal validity of the traditional formulation of the principle was available to Bernad.

²⁰ Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply*, 54 AJIL 801 (1960).

remedy.²¹ More important, there is no reference to the fact that what is involved here is what was called "the international law of contracts" rather than the law of treaties. Surely, if the imposition of the strict remedy of *restitutio* might possibly be justified in some cases, as between states, it is much harder to defend such a limitation on a state's freedom of action within its territory for the benefit of private persons. Better to understand this section of the award, one should keep in mind Professor Rigaux's astute observation that the holding as to *restitutio* was in fact what the entire arbitration was about, since Libya had already stated that it would compensate the companies concerned.²²

The award's treatment of the UN General Assembly resolutions commonly associated with the proclamation of the "new international economic order"²³—the award's second "unique" feature, according to counsel for the plaintiff²⁴—faces a similar problem. We may leave to one side, for present purposes, the broader issue of the significance for international law of the Charter of Economic Rights and Duties of States and other related documents.²⁵ The issue here is more limited. It is settled legal learning that the impact of legal norms is relative: To reach a conclusion the comparative strength of the norms on each side of a given conflict must be assessed. Here, the legal effect of the NIEO instruments is to be considered, not as against the international law rules concerning the treatment of aliens, or those regarding the exercise of diplomatic protection, but as against the norms constituting the "international law of contracts." The latter is at best a fragile structure, based (according to its proponents) on the capacity of states to assume binding legal obligations toward private persons, as evidenced by some state practice, a handful of arbitral awards—in most of which only one party participated²⁶—and,

²¹ The award in question is *BP v. Libya*, G. Lagergren, sole arbitrator, award rendered October 10, 1973; supplementary award, August 1, 1974. The award has not yet been published in full; relevant information and excerpts are printed in G. WETTER, *supra* note 9, at 408–10, 432–40. See also *infra* note 26.

²² Rigaux, *supra* note 2, at 439–40. It does not appear that the plaintiffs had claimed such compensation or had argued that whatever Libya offered or proposed to offer was unfair or inadequate. Several months after the award was rendered, a settlement for \$152 million in crude oil was agreed upon; see R. von Mehren, *Introductory Note*, 17 ILM 1, 2 (1978).

²³ UNGA Res. 3201 (S-VI), May 1, 1974, Declaration on the Establishment of a New International Economic Order, 13 ILM 715 (1974); UNGA Res. 3202 (S-VI), May 1, 1974, Program of Action on the Establishment of a New International Economic Order, *id.* 720; UNGA Res. 3281 (XXIX), Dec. 12, 1974, Charter of Economic Rights and Duties of States, 14 *id.* 251 (1975).

²⁴ R. von Mehren, *supra* note 22, at 1.

²⁵ On its "delegitimizing" impact, in the areas we are here concerned with, see Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1, 7–8 (1976); Castañeda, *La Charte des Droits et Devoirs économiques des Etats du point de vue du droit international*, in R. FLORES CABALLERO, J. CASTAÑEDA, ET AL., *JUSTICE ÉCONOMIQUE INTERNATIONALE* 75, 112–13 (1976); and more comprehensively, R. MEAGHER, *AN INTERNATIONAL REDISTRIBUTION OF WEALTH AND POWER: A STUDY OF THE CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES* (1979).

²⁶ Such one-sided proceedings are hardly likely to lead to full investigation of the

by no means least, a veritable mountain of legal writing, not all of it from impartial sources. Relevant authoritative instruments barely suggest the contents of its norms. Against this structure is arrayed another set of norms, consisting of formal and repeated assertions of exclusive and inalienable national jurisdiction over natural wealth and resources by a large majority of the world's states. The latter norms may not be (yet) positive international law, but is their total legal effect so minimal as not to counterbalance the gossamer rules of the "international law of contracts"?²⁷ One wonders.

Better to understand the *Texaco/Calasiatic* award, one must put it in historical perspective. It reflects a significant doctrinal (and to a far lesser extent practical) trend which started in the 1950's and peaked sometime in the mid-1960's. Based in major part, but by no means exclusively, on the concern of Western ("First World") lawyers for the protection of foreign investors in developing countries, and strengthened by the lack of legal sophistication in many of these countries at that time,²⁸ this trend soon also encompassed attempts at formulating moderate or compromise positions, international legal norms that would ensure the freedom of action of host countries as well as a minimum standard of protection for investors.²⁹ Such positions, however, were generally a minority. From the very start, the most forceful and vocal elements in support of the trend saw in it a means for removing state contracts from the domain of public law, which is generally sensitive to the heterogeneity of public and private interests, and applying to them instead principles appropriate for contracts between homogeneous parties. These principles were found, in the main, in the international law of treaties, a body of law intended to govern formal instruments concluded between public collective entities, deemed equal (and homogeneous) in the eyes of the law, and thus in fact stricter—in the sense of allowing fewer exceptions to general rules and imposing fewer "public order" requirements—than even the law of private contracts in developed national legal systems. In this manner, the qualitative differences between the public and private interests at stake on each side

issues, however sensitive to the problem the arbitrator may be, as Professor Dupuy demonstrably was; *see, e.g.*, Award, para. 74. The sole arbitrator's failure to mention the Lagergren award, *supra* note 21, which had reached differing conclusions on several of the issues raised in the *Texaco/Calasiatic* case, is best seen as an illustration of the inherent limitations of such proceedings. Indeed, if the arbitrator undertakes to consider too critically the plaintiff's submissions, by taking into account the possible legal arguments and approaches of the nonparticipating defendants, he runs the risk of being accused of overstepping the bounds of (nominally) adversary proceedings.

²⁷ A possible opening of an inquiry along such "relative" lines might be offered by the discussion of the right to nationalize in paras. 76-79 of the award.

²⁸ This element was stressed in a seminal article on the subject, McNair, *The General Principles of Law Recognized by Civilized Nations*, 23 BRIT. Y.B. INT'L L. 1 (1957).

²⁹ A standard, however, that would be genuinely minimal and not reflect the strictest property-protection norms of market economies, as the traditional "international minimum standard of treatment of aliens" tended to do, as far as the economic interests of aliens were concerned. The position here referred to is that associated with the late Wolfgang Friedmann and others.

were assumed away, and the "internationalization" of state contracts led, paradoxically, to their "privatization." In much of the doctrine and in the limited practice extant, the trend points to a pervasive limitation of the host state's sovereign authority within its own territory.

The predominance of such conceptions has combined with changing perceptions on the part of developing countries to limit acceptance of this approach. Conditions and attitudes have by now radically changed.³⁰ The willingness to reach substantive compromise on legal principles and norms has evaporated.³¹ The contractual approach to development, which 15 years ago seemed to offer new possibilities for cooperative action, has been wrecked by the pace of economic and social change, which makes predictions (and promises) hazardous. Developed countries have frozen themselves in a maximalist position, symbolized by the "prompt, adequate and effective compensation" formula. Developing countries, through national and international action, have generally sought to ground their position on an unqualified assertion of national sovereignty and jurisdiction. Their effort to develop national legal and administrative structures and norms has led to a marked reversal of the earlier receptiveness to the "internationalized contract" approach.³² In their actual practice on concrete issues both sets of countries are far more flexible than their formal postures suggest. Yet, efforts on the official level to give theoretical form to such practice have been few and far between.

These trends were clearer a few years ago. Since the mid-seventies, the impact of the world economic crisis and of long-range domestic problems has seriously undermined the will and vigor of both developing and developed countries in the pursuit of international development. The outcome is profoundly unclear. We may be moving toward another effort at compromise on principles and practices for development; witness the current negotiations for the international regulation of foreign investment (transnational corporations and technology transfers). Such a movement might even encompass a revival of the "internationalized contracts" approach, presumably in a form more responsive to developmental realities and needs. But there are few if any certainties left. By reviving an approach out of what now looks like a distant past, the *Texaco/Calasiatic* award has made evident the extent of the change that has taken place and has illuminated our present impasse.

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³⁰ For an excellent summary of the situation, see the conclusions in Kuusi, *supra* note 5, at 258-64.

³¹ The UN General Assembly Resolution 1803 (XVII) of December 14, 1962, is the most durable remnant of these efforts at compromise, through linguistic ambiguity as much as through genuine concessions on all sides.

³² See Kuusi, *supra* note 5, at 239-51. It is characteristic in this respect that several of the Iranian and other petroleum arrangements, whose references to "general principles of law" are cited in the award (*e.g.*, paras. 41-42), have been amended so as to exclude such language since the early 1970's. See Kuusi, at 239-51; Vergopoulos-Michail, *supra* note 5, at 100-03. And see now, the revised version of the thesis by J. Kuusi, *supra* note 5, *The Host State and the Transnational Corporation. An Analysis of Legal Relationships* (1979).